91-316

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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JOE REDNER, et al.,

Petitioners,

v.

CITRUS COUNTY, FLORIDA, et al.,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is an ordinance enacted one day before the anticipated opening of an adult entertainment establishment, which ordinance was clearly designed to prevent the establishment from opening, a sufficient showing of bad faith to comprise an exception to the abstention doctrine as set forth in Younger v. Harris, 401 U.S. 37 (1971)?

II. Do the presence of both irreparable harm and the facial invalidity of an ordinance justify exceptions to the abstention doctrine as set forth in Younger v. Harris, 401 U.S. 37 (1971)?

III. Does a diligent inquiry into existing municipal legislation, inquiry of municipal employees, a substantial investment made in good faith reliance on these inquiries, procurement of appropriate licenses and permits, and the subsequent imposition of an ordinance negating a party's ability to engage in a business for which all this activity was designed, justify a basis to equitably estop the municipality from taking such action, as historically recognized by the Supreme Court?

LIST OF PARTIES

PETITIONERS

Appellants in the Eleventh Circuit Court of Appeals

JOE REDNER

THOMAS GEORGE SECCHIARI

PHYLLIS PATRICK

TAMMY BENARD

AMANDA BENARD OLIVER

RESPONDENTS

Appellees in the Eleventh Circuit Court of Appeals

CITRUS COUNTY, FLORIDA, a municipal corporation

CHARLES S. DEAN, individually and as Sheriff of Citrus County, Florida

SKIP HUDSON, acting Citrus County Commissioner sued individually*

ALEX GRIFFIN, acting Citrus County Commissioner sued individually*

WILLIAM F. BROSKA, acting Citrus County Commissioner sued individually*

JOHN BARNES, acting Citrus County Commissioner sued individually*

NICK BRYANT, acting Citrus County Commissioner sued individually

WAYNE WEAVER, current Citrus County Commissioner

CHESTER WHITE, SR., current Citrus County Commissioner

WILBUR LANGLEY, SR., current Citrus County Commissioner

GARY BARTELL, current Citrus County Commissioner

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*Pursuant to Supreme Court Rule 40.3, Commissioners Hudson, Griffin, Broska, and Barnes will be replaced in their official capacity in this case by their successors in office: Wayne Weaver; Chester White, Sr.; Wilbur Langley, Sr.; and Gary Bartell, acting Commissioners.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit, reported as Redner v. Citrus County, Florida, 919 F.2d 646 (11th Cir. 1990) is reprinted in Appendix "A". This Opinion reflects an action which was the consolidation of two cases before the United States District Court for the Middle District of Florida. The Opinion of the United States District Court for the Middle District of Florida, reported as Redner v. Citrus County, Florida, 710 F. Supp. 318 (M.D. Fla. 1989) is

reprinted in Appendix "B". This Opinion was rendered prior to consolidation. The unreported Memorandum and Order of the United States District Court for the Middle District of Florida, rendered subsequent to consolidation is reprinted in Appendix "C". The Order of the Court of Appeals denying the petitions for rehearing and suggestions for rehearing *en banc* is reprinted in Appendix "D". The Order of the Court of Appeals granting a stay of the judgment and mandate is reprinted in Appendix "E". The Order of the Court of Appeals granting an additional stay of the judgment and mandate is reprinted in Appendix "F".

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its Opinion on December 18, 1990. Petitions for rehearing and suggestion for rehearing *en banc* were timely filed. The Order denying rehearing and rehearing *en banc* was entered on May 20, 1991. This petition is filed within ninety (90) days of that date. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law ... abridging the freedom of speech ...

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

UNITED STATES CODE

42 U.S.C. *Section 1983*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ...

42 U.S.C Section 1985(3)

If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or

deprivation, against one or more of the conspirators.

ORDINANCES ENACTED BY CITRUS COUNTY, FLORIDA

Ordinance 88-A51, Ordinance 88-05, and Ordinance 88-06 of Citrus County, Florida are reprinted and included in their entirety in Appendix "G", "H", and "I" respectively.

STATEMENT OF THE CASE

In early March of 1988, Petitioner Redner became interested in opening and operating an adult entertainment establishment in Homosassa Springs, an unincorporated community located in Citrus County, Florida. In this endeavor, Redner investigated all applicable Citrus County ordinances, rules, regulations and permitting requirements. On the basis of this investigation, which included direct inquiries to Citrus County employees regarding any such restrictions which applied to the contemplated business, Redner determined properly that there were no regulatory obstacles in effect which would prevent him from opening an adult entertainment establishment at a specific premises.

On or about March 17, 1988, on the basis of this reliance, Redner entered into a lease for the subject premises for eighteen (18) months, thereby incurring an obligation of $36,000.00 for the term of the lease. At this point in time, Redner also undertook repairs and alterations to the premises to facilitate the presentation of performance dance shows at a cost of approximately $10,000.00. The premises was located in a commercially zoned area and was formerly a bar. In an effort to comply with all existing local requirements to open the business, the proper agencies

were contacted in an effort to secure all appropriate inspections and permits. On March 23, 1988, the premises was inspected by the Citrus County Public Health Unit for food service inspections and permits. A fire inspection was also conducted.

The proper permits were issued on March 24, 1988. Also on that date, occupational licenses for "Dance Hall", "Entertainment Cafe", and one for "Merchandise Vending Machines" were issued by the Citrus County Tax Collector in preparation for the imminent opening of the establishment. Redner was forthright in his description of the business to County officials in his attempt to get all proper licenses and permits. No specific occupational license designation existed at that time relating to adult entertainment facilities. No attempt was made to hide the intended use of the leased premises from any Citrus County employee consulted, or from the public in general. The anticipated opening of the establishment was an event which was surrounded by extensive media attention. No other adult entertainment facility existed in Citrus County prior to Redner's endeavor.

On March 25, 1988, the date Redner had anticipated opening his establishment, the Citrus County Board of County Commissioners met in emergency session and enacted Citrus County Ordinance 88-05, an emergency ordinance establishing licensing requirements for adult entertainment establishments and their employees. The nature of any alleged "emergency" is unknown other than the anticipated opening of Redner's use.[1]

Emergency Ordinance 88-05 imposed the requirement that a license be obtained prior to the presentation of any constitutionally protected expression by

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[1] Prior to Redner's attempt to open an adult establishment in Citrus County, no other such adult use had existed in the County.

any business deemed to be an adult use. The pertinent licensing application required the submission of extensive information and lengthy investigation by several administrative and law enforcement agencies. While there was a time limit for the granting or denial of a license, the provisions dealing with the appeal of any such denial contained no time limit. The fee for any such license was $750.00.

The ordinance also imposed similar requirements that any employee working at any adult use establishment similarly obtain an adult use permit to legally be employed at any such establishment. The application requirements were again extensive and the time limits for the granting or denial of any application for such a permit, while limited, had no such limitation on any appeal process of the denial of any permit. A fee of $50.00 was required with any permit.

Besides the provisions regarding licensing and permitting contained in the ordinance, Section 2-8 stated that, "Each licensee shall keep such records and make such reports as may be required by the County Administrator and the departments to implement this ordinance and carry out its purpose."

Section 5 of the ordinance established criminal penalties for any failure to comply with any provision of Citrus County Ordinance 88-05.

No provision for judicial review appeared anywhere in emergency Ordinance 88-05. The only appeal of any state action occasioned by the ordinance, which resulted in denial, was to the Board of County Commissioners, the same body with the ultimate responsibility for the administration of the ordinance (Section 6-1).

On March 29, 1988, Redner opened his establishment, and was arrested and charged with operating an adult entertainment establishment without a license.

Two subsequent attempts to open the establishment also resulted in arrests.

On March 31, 1988, when Redner was arrested the third time, bond was placed at $250,000.00. Only when Redner agreed he would not again offer adult entertainment unless either a court order or a license issued pursuant to Citrus County were obtained was his bond reduced and his release affected.

On May 24, 1988, the Citrus County Board of Commissioners met in a regular session and approved Ordinance 88-06, an adult entertainment licensing ordinance substantially similar to 88-05, but with provisions providing additional bases for license denial and other substantive provisions. Ordinance 88-06 superseded Ordinance 88-05.

Also adopted on May 24, 1988, was Ordinance 88-A51, an ordinance amending the Citrus County zoning ordinance by establishing adult entertainment use regulations.

Because of Florida statutory law, a Florida political subdivision is precluded from enacting any preclusive zoning ordinance validly without complying with the proper notice and hearing requirements.[2] This procedure takes a substantial amount of time and cannot be done on an emergency basis.

It was subsequent to the passage of emergency Ordinance 88-05, that the procedure to adopt a zoning ordinance was initiated and resulted in the passage of Citrus

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[2] Chapter 125, Florida Statutes, specifies the statutory requirements for the enactment of zoning ordinances. Section 125.66(5)(b)(1) states that, "The board of county commissioners shall hold two (2) advertised public hearings on the proposed ordinance or resolution. Both hearings shall be held after 5:00 P.M. on a weekday, and the first shall be held approximately seven (7) days after the day that the first advertisement is published. The second hearing shall be held approximately two (2) weeks after the first hearing and shall be advertised approximately five (5) days prior to the pubic hearing. The day, time, and place at which the second public hearing will be held shall be announced at the first public hearing." F.S. 125.66(5)(b)(1).

County Ordinance 88-A51, a zoning ordinance which by its provisions made the establishment of an adult use, at the premises Redner had already acquired an interest in, a non-conforming and illegal use because of the locational restrictions in the ordinance.

On the basis of violations of emergency Ordinance 88-05, state criminal prosecutions ensued against petitioners herein. Charges were leveled against Redner as owner, Thomas Secchiari as manager, and Ms. Patrick, Ms. Benard, and Ms. Oliver as performance dancers. The first arrests occurred prior to any employee disrobing to the extent that any of the specified anatomical areas prohibited by the ordinance were displayed.

Redner, et al., after the state criminal prosecutions had been initiated, brought action in Federal court against the County, the County Commissioners individually, and the Sheriff, individually, to challenge the constitutionality of Ordinance 88-05. This Federal action was filed March 31, 1988. A subsequent amendment to the action resulted in combined challenges to licensing Ordinances 88-05 and 88-06.

On motions to dismiss and motions to abstain from further proceedings, the District Court, Melton J., held that: (1) pending criminal proceedings in state court against promoters did not warrant abstention; (2) failure to allege compliance with notice requirements warranted dismissal without prejudice of pendent cause of action based on Florida law; (3) proposed class of practitioners of nude dance or adult entertainment was not type of class that would support civil rights conspiracy action; and (4) class composed of person whose activities conflict with Christian beliefs is not protected under § 1985(3). This reported decision is reprinted in Appendix "B".

Subsequent to the filing of the first federal action, a second action, challenging Ordinance 88-A51 as a valid,

content-neutral, time, place, and manner regulation and further challenging the ordinance, by alleging that Citrus County should be estopped from enforcing the zoning ordinance against Petitioner Redner, because of the factual scenario of the instant case, was initiated. Both actions were consolidated for trial.

The District Court, in Case Numbers 88-50-Civ-Oc-12 and 88-193-Civ-Oc-12, William K. Thomas, J., sitting by designation, dismissed claims against the Commissioners and the Sheriff, abstained from deciding the constitutionality of the licensing ordinances, and upheld the validity of Ordinance 88-A51. This unreported memorandum and order is reprinted in Appendix "C".

Redner, et al. appealed to the United States Court of Appeals, Eleventh Circuit, in Case No. 89-3823. The Eleventh Circuit affirmed the decision of the district court to abstain on Ordinance 88-05, to dismiss the individual Commissioners and Sheriff due to their immunity, and to deny equitable estoppel against Citrus County's enforcement of Ordinance 88-A51. The decision of the District Court to abstain on Ordinance 88-06 was reversed and remanded for further proceedings. This reported decision is reprinted in Appendix "A".

Counsel for both Petitioners and the County filed respective motions for rehearing and suggestions for rehearing *en banc*. Rehearing and rehearing *en banc* was denied on May 20, 1991.

In the state criminal cases, Redner was convicted on October 6, 1988 and was sentenced on October 17, 1988. Redner appealed the county court convictions to the circuit court for the Fifth Judicial Circuit of Florida, Case No. 88-499-CF. The state circuit court, in its appellate capacity, affirmed the convictions of the trial court and issued its mandate on August 13, 1990. Redner subsequently filed a petition for writ of certiorari with the appropriate Florida

Fifth District Court of Appeal. The petition was denied on August 31, 1990. Redner then filed a motion for rehearing of said denial, which was itself denied on September 28, 1990, thereby exhausting Redner's state court remedies of the convictions and sentences at issue herein.

Despite the fact that, at each phase of the state court proceedings it was clearly shown that Ordinance 88-05 plainly lacked the adequate procedural safeguards mandated by this Court in the case of FW/PBS v. City of Dallas, 493 U.S. 215 (1990), no relief was given nor was any written opinion issued in any state court forum.

While the federal action progressed, no order to report from the trial court was received by Redner or his Counsel. It was not until April 16, 1991, that an order, reflecting a date of August 22, 1990, was received by Redner and his Counsel. Compliance with the order was physically impossible since it commanded Redner to report within ten (10) days of it date.

A Petition for Writ of Habeas Corpus was filed in the United States District Court for the Middle District of Florida, Case No. 91-90-Civ-Oc-14 on April 22, 1991. Filed contemporaneously with the Petition for Writ of Habeas Corpus was an emergency motion for stay of state court sentence.

On April 29, 1991, a stay of the state court sentence pending the administration of the Federal Petition for Habeas Corpus was sought in the state court. The state court declared that it had no jurisdiction to entertain such a stay and the motion was withdrawn. Petitioner Redner surrendered himself to the Citrus County Sheriff instanter. Redner was immediately incarcerated and served out the remaining forty-seven (47) days of the sixty (60) day sentence imposed on him by the state trial court. The previous thirteen (13) days were served pending a determination in the state court as to whether to release

Redner on supersedeas bond during the administration of his state court appellate proceedings. Redner was released on June 4, 1991 and remains on probation pursuant to the state court sentence.

The emergency motion for stay of state court sentence was denied. The Petition for Writ of Habeas Corpus was still pending at the time the instant action was filed.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IN AFFIRMING YOUNGER ABSTENTION WITH RESPECT TO CITRUS COUNTY ORDINANCE 88-05 CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS.

A. THE BAD FAITH EXCEPTION TO THE YOUNGER ABSTENTION DOCTRINE APPLIES TO THIS CASE AND ABSTENTION WAS IMPROPER WITH RESPECT TO CITRUS COUNTY ORDINANCE 88-05.

In Younger v. Harris, this Court held that abstention is appropriate where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings; the Court recognized exceptions for bad faith, harassment, or a patently invalid state statute. 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Court has further

extended Younger to cases in which federal jurisdiction was invoked for the purposes of obtaining declaratory relief when the federal plaintiff is a defendant in a pending state criminal prosecution, if Younger would have barred an injunction in the circumstances. Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). Younger was further extended when the Supreme Court held that federal courts may not provide declaratory relief if a state prosecution is commenced against the federal plaintiffs "after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court ..." Hicks v. Miranda, 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 2223 (1975); see also Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

The Court of Appeals, applying Younger and its progeny to the facts of this case, concluded that the district court properly abstained from deciding the constitutionality of Ordinance 88-05. Recognizing that, as long as a federal challenge to a state statute or local ordinance "relate[s] to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14, 107 S.Ct. 1519, 1527, 95 L.Ed.2d 1 (1987).

The Court of Appeals recognized that the state criminal proceedings were well under way by the time, "any proceedings of substance on the merits [had] taken place in federal court." (citing Hicks, 422 U.S. at 349, 95 S.Ct. at 2292). This threshold Younger consideration was deemed an appropriate basis to invoke the doctrine of abstention.

In addressing the alleged bad faith of Citrus County as a possible exception to the Younger doctrine, the Court focused only on a consideration of the presence of state

prosecutions undertaken in bad faith. Bad faith was defined as "a prosecution (which) has been brought without a reasonable expectation of obtaining a valid conviction". Kugler v. Helfant, 421 U.S. 117, 126 n.6, 95 S. Ct. 1524, 1531 n.6, 44 L. Ed. 2d 15 (1975).

The Court of Appeals stated that Redner presented no evidence that the prosecution was brought without a reasonable likelihood of obtaining a valid conviction and (in Footnote 8 of the reported opinion) suggests that the only bad faith that Redner asserts was the County's enactment of an ordinance directed solely at him one day before he planned to open his adult entertainment facility.[3]

The Court of Appeals further stated that, "Nothing about that act by the County seems to establish, in itself, bad faith". (Footnote 8 of the Opinion).

There is precedent to the contrary which supports the bad faith argument.

As this Court has consistently recognized, the instant case involves the attempted presentation of entertainment held to be expression which is entitled to limited protection under the First Amendment. California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 3342 (1972); Schad v. Mt. Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981); Barnes v. Glen Theater, 59 L.W. 4746 (1991).

In the instant case, the factual scenario and sequence of events indicate clearly the existence of bad faith and the

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[3] **At the emergency hearing conducted for the enactment of Ordinance 88-05, the acting commissioners made comments like, "[help] this board to close that place down" and "get out, get after the man that owns the property who has leased it to [petitioner] ... see if maybe you could get him to change his mind and do whatever he has to do ... see if you can convince him that he's made a mistake." and "I think you know what I mean, but we need to, again, restrict our comments to the thing in front of us to make sure because this thing may end up in court. We want to make sure that we don't mess it up by what we say in public ..." (commissioners Broska and Bryant).**

imposition of an unconstitutional prior restraint sufficient to qualify as an exception to the Younger abstention doctrine.

In Avalon Cinema Corporation v. Thompson, 677 F. 2d 659 (8th Cir. 1981) {modified as to Attorneys Fees, 689 F. 2d 187 (8th Cir. 1982)}, the factual scenario was almost identical to the situation herein. In Avalon, building permits to construct a movie theatre and bookstore at a single location in North Little Rock, Arkansas were obtained on September 30, 1980. At that point in time, the location was properly zoned as a commercial area. Also on that date, the proper occupational license (or privilege license) to operate a movie theatre was obtained. Avalon planned to exhibit at the theatre sexually-oriented films to consenting adults over eighteen (18) years of age. There were no adult movie theatres in the City at the time, and none, other than Avalon, was preparing to open. Money was spent remodelling and preparing the theatre for its commercial opening.

The City had a separate privilege license for "adult" bookstores in addition to the license for bookstores generally. It did not have a separate license for "adult" movie theatres.

On November 19, 1980, Avalon secured the privilege license to operate an adult bookstore at the selected site. That same day, the North Little Rock City Council convened a special meeting for the purpose of enacting an emergency zoning ordinance that prohibited, within one hundred yards of specified structures and areas in the City, the exhibition or sale of any sexually-oriented film. The Avalon Theatre was located within one hundred yards of a residential area. The emergency ordinance effectively precluded Avalon from legally commencing business.

The Avalon court, in concluding that the ordinance could not be squared with the relevant precedents under the

First Amendment, found that the action of the City failed to meet the four part test in United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), and called into question not only the applicability of the evidentiary basis used to support the ordinance, but the timing of the enactment of the ordinance as well.

> "...In the present case, the North Little Rock City Council enacted its zoning ordinance, which prohibited the showing of certain sexually explicit films within 100 yards of specified areas, only after learning of the imminent opening of the City's first "adult" movie theatre." Avalon, at 661.
>
> "...Although the Avalon Cinema had not officially opened at the time the North Little Rock ordinance was passed, all preparatory work had been substantially completed. Given the fact that no other adult theatre existed in the City, the ordinance had the effect of virtually suppressing public access to sexually-oriented (but non-obscene) adult entertainment....
>
> "...Here it is clear that the North Little Rock ordinance fails at least the third part of the O'Brien test. The City Council enacted the ordinance only after being informed of the impending opening of the Avalon Cinema adult theatre. We cannot ignore the fact that its passage was an "emergency" measure to prevent the exhibition and sale of sexually-oriented films in North Little Rock...

"...In sum, the North Little Rock ordinance is clearly a content based regulation of protected speech". Id at 662, 663.

While the instant case deals with an "emergency" licensing ordinance and Avalon dealt with an "emergency" zoning ordinance, Citrus County was precluded from enacting any "emergency" zoning ordinance because provisions of Chapter 125, Florida Statutes, contain specific notice and hearing requirements, which include minimum and maximum time limitations for the publication of such public notices, thus making "emergency" adoption of a zoning ordinance a legal impossibility.

The analogy is clear. In both situations, municipal legislation is arguably being utilized to preclude specific parties from the presentation of First Amendment protected expressive entertainment. This Court has recognized no impact in this distinction, clearly indicating that when either zoning or licensing ordinances are utilized impermissibly to restrain First Amendment protected activities, they are equally as invalid.[4]

In 754 Orange Ave v. City of West Haven, Conn., 761 F. 2d 105 (1985), the court affirmed a lower court injunction against the City of West Haven from enforcing its zoning and licensing ordinances against a company wishing to present sexually-oriented entertainment on a leased premises. The court held that:

"(1) To anyone who would contemplate

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[4] See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), in which a licensing ordinance was held unconstitutional on First Amendment issues, and 11126 Baltimore Blvd. v. Prince George's County, Maryland, 110 S. Ct.2580 (1990) in which the same First Amendment safeguards were applied to a zoning ordinance.

establishing a bookstore business within the city's jurisdiction, the city's threat to enforce its zoning and licensing ordinances operated as a prior restraint;
(2) The ordinance could not be justified as a reasonable time, place, and manner restriction;
(3) The ordinance was impermissible as enacted, because its adoption strongly suggested that it was aimed solely at the company in question; and
(4) The company which proposed to operate the adult bookstore on the leased premises was entitled to preliminary injunctive relief against the operation of ordinance." Id. at 111.

In 754 Orange, the factual scenario is again almost identical to the instant case. On February 24, 1984, 754 Orange applied to the City for a building permit to make renovations to a leased premises in order to open an adult bookstore and theater. The City had a zoning ordinance which placed restrictions on amusement and entertainment facilities, but its applicability to the use contemplated by 754 Orange was "unclear", save for a provision involving locational distance restrictions to schools, parks or playgrounds, which provision was clearly not applicable to 754 Orange because the nearest preclusive use was over 1,000 feet away.

The City also had a licensing and permitting ordinance that was similarly unclear in addressing the applicability to the coin operated viewing machines contemplated for the leased premises. None of these issues were addressed or resolved when 754 Orange applied to the City for a building permit, which the City refused to issue.

On April 23, 1984, 754 Orange filed in federal court for injunctive and declaratory relief. On May 4, 1984, the court ordered the City to issue the building permit. The City did not and more litigation ensued.

On June 15, 1984, the City amended section 32-2.7, the municipal zoning legislation whose applicability to the proposed establishment was unclear. This amendment extended the minimum location distance restrictions and imposed a requirement that 754 Orange obtain a special permit from the Planning and Zoning Commission to conform to the special permitting provisions as well as any further restrictions set forth by the Planning and Zoning Commission.

The 754 Orange court addressed several First Amendment issues, but the most salient application to the instant case is the following:

> "In addition, section 32-2.7 is impermissible as enacted, because its adoption strongly suggests that it was aimed solely at 754 Orange. Only after the City learned that 754 Orange's leased premisses is beyond 1,000 feet from any school, park or playground did the City amend the ordinance so as to include 754 Orange's building within its scope. It is true that, as a matter of general zoning law in Connecticut, a permit applicant does not have a vested right in the existing classification of his land; instead his right to establish a particular use may be summarily terminated by an amendment that reclassifies his land and outlaws the use in question. (Citation omitted.)

> "Even as a matter of zoning law, however, a court will not allow changed building zone regulations to act as a bar to a building project where it would be inequitable to do so." (Citation omitted.) Id. at 113.

The notable similarities between the factual scenarios of Avalon and 754 Orange are clear evidence that Citrus County acted in an impermissible manner in its "emergency" enactment of Ordinance 88-05. It is axiomatic that the imposition of municipal legislation which results in a discriminatory prior restraint should be construed as an act of bad faith.

The exception noted in Younger, and based on Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, (1965) is appropriately applied to the circumstances of the instant case.

> "'[T]he threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statute to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.' 380 U.S., 482, 85 S.Ct. at 1118-1119, Id. at 752.

Citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 817, 96 S.Ct. 1236, 1244, 1246, 47 L.Ed.2d 483 (1976), the Court of Appeals recognized that:

> "Abstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Id. at 813.

The implications of the Court of Appeals decision involve issues of nationwide importance. If the actions of Citrus County are not construed as an exhibition of bad faith and an exception to the Younger doctrine, the possibility of using municipal legislation as an improper yet entirely effective prior restraint, resulting in the erosion of First Amendment freedoms, clearly exists. Because the Court of Appeals' opinion has such wide-ranging implications and conflicts with the applicable decisions of this Court, and many other courts, this Court should grant review.

B. THE PRESENCE OF IRREPARABLE HARM AND THE FACIAL INVALIDITY OF ORDINANCE 88-05 JUSTIFY EXCEPTIONS TO THE YOUNGER DOCTRINE.

The Younger doctrine states that in addition to the existence of a prosecution undertaken in bad faith, the existence of exceptional circumstances creating a threat of irreparable injury both great and immediate also qualifies as an exception to the doctrine. See Kugler v. Helfant, supra. A judicial exception evidenced by any applicable federal anti-injunction statute has been made where a person about

to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages. See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 529 L.Ed. 714 (1908).

In addressing this exception, and most specifically the existence of irreparable harm, this Court has held that the loss of First Amendment freedoms, for even a very short period of time, constitutes such irreparable harm. The actual loss suffered by Petitioners in this instant action goes far beyond the mere "chilling effect" referred to in Younger.

> "...The loss of First Amendment freedoms, for even a minimal period of time, unquestionably constitutes irreparable injury. See New York Times Co. v. United States, 403 U. S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971). Since such injury was both threatened and occurring at the time of respondents' motion and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief. See Bantam Books Inc. v. Sullivan, 372 U.S. 58, 67, 83 S. Ct. 631, 637, 9 L.Ed. 2d 584 (1963)." Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673 (1976).

It is the combination of this "chilling effect" with the existence of a showing of bad faith and the clear facial invalidity of Ordinance 88-05, as shown in the factual scenario herein, which makes Younger abstention inapplicable. The cumulative effect of the actions of Citrus

County must be recognized.

> "...It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." Id. 91 S. Ct. at 755.

The instant case makes such a showing. Redner was effectively and entirely precluded from the presentation of First Amendment protected expressive entertainment through the reactionary enactment of "emergency" Ordinance 88-05. The combination of this with the irreparable harm caused by the Petitioners' loss of their First Amendment rights indicates that the Court of Appeals incorrectly failed to recognize an exception to Younger abstention as related to Ordinance 88-05.

The facial invalidity of the ordinance was also clearly indicated to the Court of Appeals as well as all lower courts. Substantial authority questioning the lack of procedural safeguards and the possibility of an unconstitutional prior restraint (which became a reality) was pointed out in every forum.

In FW/PBS, supra, this Court reviewed a comprehensive ordinance adopted by the City of Dallas, which regulated sexually oriented businesses.

There are several critical similarities between the Dallas ordinance and Citrus County Ordinance 88-05.

The Dallas ordinance was struck down as being violative of the First Amendment, on the grounds that it constituted a prior restraint upon protected expression, and

that it failed to provide adequate procedural safeguards as required by Freedman v. Maryland, 380 U.S. 51 (1965).

This Court used the analogy that, like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of a license. This Court held that a license for a First Amendment protected business must be issued in a reasonable period of time and, therefore, the first two Freedman safeguards are essential.

In the Dallas ordinance, there was a requirement that the Chief of Police approve the issuance of a license within 30 days after the receipt of an application, and also conditioned such issuance upon approval by other municipal inspection agencies without setting forth time limits within which those inspections must occur. Since the ordinance failed to set forth an effective time limitation on the licensing decision, and since it also failed to provide an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial, its licensing requirement was unconstitutional.

Citrus County Ordinance 88-05, in § 2-5 (a)(1), "Time Period for Granting or Denying License", places a forty-five (45) day limit after proper filing to process an application with the County Administrator. Subsection (c) of the section provides, just like the Dallas ordinance, that denial can be conditioned on any disapproval of other local government inspection agencies, namely (as set forth in § 2-4(a)), the Department of Development Services, Fire Protection, and the Health Department.

Under Florida law, forty-five (45) days is adequate time to pass a zoning ordinance, which in actuality Citrus County did, resulting in zoning non-compliance for the anticipated premises of Petitioner's business.

Section 2-4(a) of Ordinance 88-05 states only that:

> "... Each department shall promptly conduct an inspection of the applicant, application and the proposed establishment in accordance with its responsibilities ..." Ordinance 88-05, § 2-4(a).

Clearly, just like the Dallas ordinance, Citrus County places no specific time limitation on the County's inspection agencies other than the vague suggestion that they be "prompt". In addition to this infirmity, allowing an applicant to begin operation pursuant to § 2-5(a)(1) after the expiration of the forty-five (45) day period, "unless and until the County Administrator notifies the applicant of a denial of the application and states the reasons for the denial" results in inadequate procedural safeguards under this Court's prior decisions.

The forty-five (45) day approval period leaves an applicant vulnerable not only to penal sanctions for any County code or regulatory violations which may occur during the interim between submission and approval or denial, but is also compounded by other infirmities in the ordinances.

Section 2-11 provides for the suspension of a license for a variety of alleged local government regulatory violations. This section states that:

> "The Department shall promptly notify the licensee of the violation and shall allow the licensee a seven (7) day period in which to correct the violation, If the licensee fails to correct the violation before the expiration of the seven day period the Department shall notify the County Administrator, who shall forthwith suspend the license, and shall

> notify the licensee of the suspension. The suspension shall remain in effect until the Department notifies the County Administrator in writing that the violation of the provision in question has been corrected."

Clearly, by not limiting the time in which the Department must notify "in writing" the County Administrator, this infirmity would also invalidate the ordinance under the FW/PBS Inc. decision. Not only do these subtle "loopholes" allow unbridled administrative discretion, the entirety of § 3 of the ordinance, which imposes an additional permitting provision on any potential employee, emphasizes even more the extent to which the ordinance in question is unconstitutional.

The critical consideration at this point involves the second required procedural safeguard set forth in Freedman, supra: expeditious judicial review. As stressed in the FW/PBS Inc. case, the existence of this prompt judicial review is absolutely essential. FW/PBS Inc. cites not only Freedman, supra, but also Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1971) (at 155) for the proposition that a content-neutral time, place and manner regulation must provide for "expeditious judicial review". See also, National Socialist Party v. Skokie, 432 U.S. 43 (1977).

Section 6, titled "Miscellaneous Provisions" provides in § 6-1 - Appeals:

> "(1) Within fifteen (15) days of the mailing of a notice of denial of an application for a license or permit or a notice of suspension or revocation of a license or permit, the aggrieved party may file a notice of appeal

with the Board.

> "(2) The notice of appeal shall be filed with the Clerk of the Board. The notice of appeal shall be accompanied by payment of a filing fee of fifty dollars ($50.00) to cover administrative costs. Upon receipt of the notice of appeal and upon payment of the accompanying fifty dollars ($50.00) filing fee, the Clerk shall schedule a hearing for as soon as the Board's calendar will allow. The Clerk shall provide the appellant with at least ten (10) days notice of the time and place for the hearing." Ordinance 88-05, § 6-1; 6-2.

Not only does this section crumble from the weight of Constitutional scrutiny when the vague period of time "as soon as the Board's calendar will allow ..." is tested against the previous points and authorities contained herein, but it also fails the second part of the Freedman test. The review afforded in § 6 is insufficient.

In Blount v. Rizzi, 400 U.S. 410 (1971), this Court held that similar administrative hearings came nowhere near the standards required for "judicial review". The Court found that an administrative censorship scheme created by the Postal Reorganization Act and allowing the Postmaster General, following administrative hearings, to effectively decide which materials be afforded First Amendment protections, was totally unacceptable.

As a fundamental right, freedom of speech demands due process to be regulated, and the amount of process "due" was held to be of the strictest judicial requirement. The Court held that because only a judicial determination in an adversary proceeding ensures the necessary sensitivity

to freedom of expression,only a procedure requiring a judicial determination suffices to impose a valid final restraint. Id. at 424.

The cumulative effect of the facial invalidity of Ordinance 88-05, in combination with the actions of Citrus County indicate that precisely that type of prior restraint that both the Framers and this Court find most repugnant is evident in the instant scenario and justify an exception to the Younger abstention doctrine. Because of the potential dangers inherent in the instant case, this Court should grant review.

II.

THE COURT OF APPEALS MISCONSTRUED THE APPLICATION OF EQUITABLE ESTOPPEL TO THE INSTANT FACTS RESULTING IN CONFLICT WITH THE RATIONALE BEHIND THE DECISIONS OF UNITED STATES V. HETH, HACKETT V. CITY OF OTTAWA, AND THEIR PROGENY.

This Court has historically recognized and applied the doctrine of equitable estoppel. In United States v. Heth, 7 U.S. 399 (1806) and in Hackett v. City of Ottawa, 99 U.S. 86 (1878) the Court recognized that a local government is held to careful adherence to truth in its dealings and cannot by its representations or silence involve others in onerous engagements and then defeat the claims their own conduct has superinduced.

In the instant case, Redner diligently researched all applicable regulations for the establishment of the anticipated business. This research included direct inquiry of various Citrus County employees and municipal

agencies. Based on representations and research, he obtained all licenses and permits then required by Citrus County.[5] Thus there were numerous actions imputed to Citrus County on which Redner reasonably, and in good faith, relied. This reliance was much to Redner's detriment, in that he substantially altered his position in good faith reliance on the actions of Citrus County.

The Court of Appeals summarized its entire position on this issue in one (1) footnote (footnote four [4], Appendix A at 648). Addressing only the zoning issue, that court found that Redner was unentitled to rely on the inaction of Citrus County in not earlier adopting a zoning ordinance regulating the location of adult entertainment facilities.

Relying entirely on Florida law (City of Miami Beach v. 8701 Collins Ave., Inc., 77 So.2d 428, 430 [Fla. 1954]; City of Fort Pierce v. Davis, 400 So.2d 1242, 1244 [Fla. App. 4th Dist. 1981]; Pasco County v. Tampa Development Corp., 364 So.2d 850, 853 [Fla. App. 2d Dist. 1978]), the Court of Appeals found that estoppel did not apply. A closer inspection of the facts would indicate that this finding is inaccurate.

In denying Redner's sought for relief, based on the due process claim of equitable estoppel, the Court of Appeals failed to recognize that in the Florida cases cited, the aggrieved property owners made little or no contact whatsoever with the local governments, and made little or no efforts to ascertain what regulations might apply to their situations. In the instant case, Redner made such extensive contacts with Citrus County prior to his first effort to

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[5] There was an issue as to whether or not the renovations undertaken on the premises leased by Redner in reliance on the actions of Citrus County required a building permit. This issue was not resolved and Redner submitted that the "red tag" issued by Citrus County was another tactic to impose a prior restraint.

provide the subject form of expression, that Citrus County reacted by enacting an emergency ordinance which effectively restrained him from presenting any expression. The same factual setting applies with respect to the zoning ordinance (88-A51), in that Redner diligently ascertained that there were no zoning provisions to impede his plans, and he substantially altered his position to his detriment in his good faith reliance upon that finding, the representations of Citrus County employees, and the issuance of occupational licenses, inspections and permits.

> "... In Wheeler [v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981)] a property owner obtained a permit from the city to construct an apartment complex. The permit was issued pursuant to a city ordinance. The property owner began construction on the site in reliance on the permit. Local residents opposed the development, and after a referendum, the city passed a new ordinance prohibiting the plaintiffs from proceeding with construction.' Id. at 100. This Court affirmed the district court's findings ...
>
> "Wheeler is indistinguishable from this case. The original resolution granted appellant a property interest. The rezoning ordinance denied appellant this property interest because the new classification did not accommodate [the proposed use]. The City Commission's action was therefore a confiscatory measure." A.A. Profiles v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988).

See also, Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988).

In the instant case, there was no ordinance of any type pending at the time Redner prepared to start business and in fact no action was taken by Citrus County until the day before Redner was to open. See also, Southern Cooperative Development Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983), wherein the Court stated that:

> "It would therefore indeed be inequitable to permit the defendants to take advantage of a new law enacted while an application for plat approval, valid when filed, has been unlawfully delayed". Id. at 1354.

The Court of Appeals has misapprehended the law in its assessment of the factual scenario herein. This comprises a departure from the historical position of this Court and poses the danger that a failure to recognize the doctrine of equitable estoppel can result in an exercise of state action which results in an impermissible prior restraint. Because of the fundamental nature and First Amendment considerations inherent in the issues presented by the instant case, this Court should grant review.

DATED August 19, 1991

Respectfully submitted,

Luke Charles Lirot
Attorney for Petitioners

(2)

No. 91-316

In The

Supreme Court of the United States

October Term, 1991

JOE REDNER, et al.,

Petitioners,

vs.

CITRUS COUNTY, FLORIDA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT DEAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case involves the consolidation of two cases below. Respondent Charles S. Dean, Sheriff of Citrus County was named as a party only in Case No. 88-50-CIV-OC-12.

The facts of that case are as follows: In an emergency session on March 25, 1988, the Board of County Commissioners of Citrus County enacted Ordinance 88-05 which provided that no adult entertainment establishment could operate without first having been issued a license by the County Administrator. (R2-35-4-6). On March 29, 1988, Petitioners Redner and Patrick were arrested for violation of Ordinance 88-05. (R2-35-8). Immediately after his release, Petitioner Redner reopened his business and he and Petitioners Secchiari and Patrick were arrested. (R2-35-8-9). On March 31, 1988, having been released, Petitioner Redner once again reopened his business and he and Petitioners Secchiari, Benard and Oliver were arrested. (R2-35-9). Petitioners alleged that the ordinance was unconstitutional for several reasons, but did not allege that they were not in fact violating the ordinance or that they were arrested without probable cause. (R35-10-14).

The Second Amended Complaint contained four counts: Count I for unconstitutionality of the Citrus County Ordinances; Count II a pendent state law claim for improper adoption of the ordinances; Count III for unconstitutionality of the bond conditions; and Count IV for conspiracy under 42 U.S.C. §1985(3) and §1983. (R2-35-1-20). By Order dated February 13, 1989, the trial court dismissed Count I as to Respondent Dean with

regard to damages only, dismissed Count II without prejudice and dismissed Counts III and IV in their entirety. (R3-53-13). At the conclusion of a three-day trial on the merits pursuant to Fed. R. Civ. P. 65, the trial court dismissed the claim for injunctive relief against Respondent Dean. (R14-681). Plaintiffs presented no evidence at trial that Respondent Dean would attempt to enforce the ordinance if declared unconstitutional and counsel for Respondent Dean affirmatively represented to the trial court that Respondent Dean would not enforce the ordinance if declared unconstitutional. (R14-678).

The Eleventh Circuit Court of Appeals held that the trial court had properly dismissed the claim against Respondent Dean both for damages and for injunctive relief. *Redner v. Citrus County Florida*, 919 F.2d 646, 648 n.3 (11th Cir. 1990).

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied as to Petitioners' claim against Respondent Dean. The decision of the trial court dismissing both the damages claim and the claim for injunctive relief against Respondent Dean was affirmed by the Eleventh Circuit Court of Appeals based on this Court's decision in *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979) and based on Petitioners' failure to show that Respondent Dean would enforce the ordinances if they were declared unconstitutional. 919 F.2d at 648 n.3. Petitioners have not presented any reason for granting the writ of certiorari with respect to that portion of the Eleventh Circuit's Decision. Therefore, the

writ of certiorari should not be granted as to Respondent Dean.

ARGUMENT

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit alleges two reasons for granting the writ. Petitioners assert that the decision of the court of appeals affirming *Younger* abstention conflicts with prior decisions of this Court and lower Federal Courts and that the Court of Appeals misconstrued the application of equitable estoppel to the facts of the instant case.

Neither of these grounds presents any reason for granting the writ of certiorari as to Respondent Dean. The trial court dismissed all claims against Respondent Dean on other grounds before deciding the abstention and equitable estoppel arguments.

The damages claim against Respondent Dean was dismissed based on this Court's decision in *Michigan v. DeFillippo,* 443 U.S. 31, 38 (1979) which held that law enforcement officers are immune from claims for damages for enforcing presumptively valid laws. The claim for injunctive relief against Respondent Dean was dismissed because Petitioners failed to show that Respondent Dean would enforce the ordinances if declared unconstitutional. 919 F.2d at 648 n.3.

Petitioners have presented no decision of this Court or any United States Court of Appeals which conflicts with the Eleventh Circuit's decision as to Respondent

Dean. Nor have Petitioners presented any other reason pursuant to U.S. Sup. Ct. Rule 10, 28 U.S.C. for this Court to review the decision of the Court of Appeals with regard to Respondent Dean. The dismissal of the claims against Respondent Dean are not "fairly comprised within the questions presented by the petition for certiorari" and therefore must not be considered by this Court. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied as to the dismissal of the claims against Respondent Dean.

Respectfully submitted,

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No. 91-316

In The

Supreme Court of the United States

October Term, 1991

JOE REDNER, ET AL.,

Petitioners,

v.

CITRUS COUNTY, FLORIDA, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals' ruling, endorsing *Younger v. Harris'* abstention, is inconsistent with this Court's decisions, because of a bad-faith or an irreparable harm exception.

2. Whether Petitioner's claim of equitable estoppel under Florida law, which was rejected by the district court and affirmed by the court of appeals, presents an issue appropriate for review by this Court.

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STATEMENT OF CASE

For the limited purpose of this Court considering the issues raised in the Petition for Writ of Certiorari by Petitioner Redner, the Statement of the Case in that Petition may be accepted.

SUMMARY OF ARGUMENT

The court of appeals' ruling, endorsing the principle of *Younger* abstention, is consistent with this Court's decisions. Petitioner failed to demonstrate any existence of bad faith. No evidence existed that Redner was prosecuted without the reasonable probability of obtaining a conviction. Additionally, Petitioner has not shown extraordinary circumstances constituting irreparable harm which would entitle him to relief. He did not refrain from conduct in the face of threatened prosecution, but violated the ordinance without challenging it.

Petitioner's request for this Court's review of his claim of equitable estoppel under Florida law is inappropriate. This Court should defer to the court of appeals' application of ample Florida case law, in ruling that equitable estoppel did not apply.

ARGUMENT

I. NOTHING ABOUT THE COURT OF APPEALS' (AND THE DISTRICT COURT'S) RULINGS ENDORSING *YOUNGER V. HARRIS* ABSTENTION IS INCONSISTENT WITH, OR CONTRADICTORY TO, THIS COURT'S DECISIONS.

In *Younger v. Harris*, this Court declared that "it has been perfectly natural for our cases to repeat time and

time again that *the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.*" 401 U.S. 37, 45, 91 S.Ct. 746, 751, 26 L.Ed.2d 669 (1971) (emphasis added).

> Here a proceeding was already pending in the state court, affording Harris [the plaintiff] an opportunity to raise his constitutional claims. There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected. In other words, the injury that Harris faces is solely "that incidental to every criminal proceeding brought lawfully and in good faith," . . . and therefore under the settled doctrine which we have already described, he is not entitled to equitable relief "even if such statutes are unconstitutional."

Id. at 49, 91 S.Ct. at 753. "So long as [petitioner's] challenges relate[d] to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation *mandates that the federal court stay its hand.*" *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14, 107 S.Ct. 1519, 1527 (1987) (emphasis added). No extraordinary or exceptional circumstances, nor instance of bad faith have ever been shown to exist in the case at hand, as the court of appeals concluded. *Redner v. Citrus County, Fla.*, 919 F.2d 646, 650 (11th Cir. 1990).

Petitioner's arguments of bad-faith, and irreparable-harm exceptions to *Younger v. Harris* abstention (1) were consistently rejected by the court of appeals and the district court below, because (2) in the facts of this case, they are squarely repugnant to this Court's decisions and pronouncements.

A. No Bad-Faith Exception Was Ever Demonstrated.

Petitioner Redner confuses the enactment of the temporary Citrus County adult entertainment licensing ordinance (88-05),[1] which he was convicted of thrice violating, with the prosecution of him for violation of the ordinance.

Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) involved state-court criminal prosecutions of operators of news stands displaying and selling allegedly obscene materials. The operators obtained an injunction from the federal district court against their prosecution by the state of Louisiana in the state courts. *Id.* at 83-84, 91 S.Ct. at 676. This Court reversed.

> According to our holding in *Younger v. Harris, supra*, such federal interference with a state prosecution is improper. The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, . . . subject, of course, to review by certiorari or appeal in this Court or, in a proper case, on federal habeas corpus.

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[1] Petitioner points to statements made during the legislating session of the Board of County Commissioners of Citrus County. Petition for Writ of Certiorari (Petition), at 13 n.3. It yields him no headway. The constitutionality of legislation may not be attacked based on the subjective considerations and motives of those who enacted it. *United States v. O'Brien*, 391 U.S. 367, 382-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672 (1968).

Id. at 84-85, 91 S.Ct. at 676-77. The federal court's injunction had "crippl[ed] Louisiana's ability to enforce its criminal statute against Ledesma," but

> There [was] nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good-faith attempt to enforce the state's criminal laws.

Id. at 85, 91 S.Ct. at 677.

In the case at hand, the court of appeals followed this Court's standard for bad-faith prosecution, stated in *Kugler v. Helfant*, 421 F.2d 117, 126 n.6, 95 S.Ct. 1524, 1531 n.6, 44 L.Ed.2d 15 (1975), as one where "a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." *Redner v. Citrus County, Fla.*, 919 F.2d at 650. In *Kugler v. Helfant*, the plaintiff filed suit in federal court to enjoin a state-court criminal prosecution against him, based on allegations that the New Jersey Attorney General and members of the New Jersey Supreme Court had acted together, in collusion, to coerce testimony by him, a municipal judge, before a grand jury, and to bring about the prosecution of him. *Id.* at 125-26 & n.6, 95 S.Ct. at 1531 & n.6. This Court "[did] not agree that these facts bring this litigation within any exception to the basic *Younger* rule" of abstention. *Id.*

The facts in the present case, less unusual or atypical than those in *Kugler v. Helfant*, place this case far beyond any exception to the fundamental rule of *Younger v. Harris* abstention. The court of appeals found "no evidence that the prosecution was brought without reasonable

probability of obtaining a valid conviction,"[2] other than the enactment of the ordinance itself. 919 F.2d at 650 & n.8.

> Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.

Mitchum v. Foster, 407 U.S. 225, 230-31, 92 S.Ct. 2151, 2156 32 L.Ed.2d 705 (1972); *quoting Kugler v. Helfant*.

B. No Irreparable Harm Exception Was Ever Shown.

In *Younger*, this Court emphatically reaffirmed "the fundamental policy against federal interference with state state criminal prosecutions."

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[2] In fact the reasonable probability of obtaining a conviction of Petitioner Redner, for his three violations of Citrus County adult entertainment licensing ordinance (88-05) ripened into certainty; and his convictions were affirmed on appeal, with further state-court, discretionary review denied.

Petitioner Redner then began, in the state courts, collateral attacks on his convictions, following which he brought a petition for writ of habeas corpus in the same federal district court that had abstained from deciding the merits of his challenges to the constitutionality of the temporary licensing ordinance in his federal, civil rights lawsuit. That petition for writ of habeas corpus, challenging the validity of his convictions – by raising the same attacks on the constitutionality of the same temporary licensing ordinance – remains pending before the federal district court.

> 401 U.S. at 46, 91 S.Ct. at 751. It made clear that *even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it."*

Id., at 230, 92 S.Ct. at 2156 (emphasis added).

No genuinely extraordinary circumstances, to justify deviating from the *Younger v. Harris* principle of abstention, were ever shown – or exist – in the case at hand.

> The very nature of "extraordinary circumstances," of course, makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings. But whatever else is required, such circumstances must be "extraordinary" in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.

Kugler v. Helfant, 421 U.S. at 124-25, 95 S.Ct. at 1531.[3]

Younger v. Harris was a classic case, involving the exercise of First Amendment liberty to express political views. The plaintiffs in federal court were subject to prosecution, as defendants, in the California state courts because the expression of their political views appeared to violate a state "Criminal Syndicalism Act." This Court reversed the district court's injunction "as a violation of the national policy forbidding federal courts to stay or

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[3] This Court described some examples to the type of extraordinary circumstances, warranting federal intervention as an exception to *Younger* abstention. *Id.* at 125 n.4, 95 S.Ct. at 1531 n.4.

enjoin pending state court proceedings except under special circumstances." 401 U.S. at 41, 91 S.Ct at 749. "[This] Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is 'both great and immediate.' " *Id.* at 46, 91 S.Ct. at 751.

The Court declared that "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Id.* at 51, 91 S.Ct. at 754.

> [T]he chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary tasks of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and Constitution.

Id. at 51-52, 91 S.Ct. at 754. "[T]his sort of 'chilling effect,' as this Court called it, should not by itself justify federal intervention." *Id.* at 50, 91 S.Ct. at 753.

Petitioner Redner was not simply "placed 'between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in [another] criminal proceeding.' " *Wooley v. Maynard*, 430 U.S. 705, 710, 97 S.Ct. 1428, 1433, 51 L.Ed.2d 752 (1977). The then-ongoing, state-court, criminal proceedings against him, deprived him of the status (unlike the plaintiffs in *Wooley v. Maynard, supra*) of one confronted with the simple alternatives (1) of refraining from

intended activity, or (2) being charged with criminal prosecution for the conduct.

This Court has explained the differences between persons, like Petitioner Redner, faced with ongoing, state criminal proceedings because of their conduct, and those whose conduct has been inhibited by the threat of prosecution.

> The classic example is the petitioner in *Steffel [v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)], and his companion. Both were warned that failure to cease pamphleteering would result in their arrest, but while the petitioner in *Steffel [v. Thompson]* ceased and brought an action in the federal court, his companion did not cease and was prosecuted on a charge of criminal trespass in the state court. 415 U.S., at 455-456, 94 S.Ct. at 1213-1214. The same may be said of the interest in conservation of judicial manpower. As worthy a value as this is in a unitary system, the very existence of one system of federal courts and 50 systems of state courts, all charged with the responsibility for interpreting the United States Constitution, suggests that on occasion there will be duplicating and overlapping adjudication of cases which are sufficiently similar in content, time, and location to justify being heard before a single judge had they arisen within a unitary system.

Doran v. Salem Inn, Inc., 422 U.S. 922, 928, 95 S.Ct. 2561, 2566, 45 L.Ed.2d 648 (1975).

This Court rejected the notion "that all three plaintiffs should automatically be thrown into the same hopper for *Younger [v. Harris* abstention] purposes, and should thereby each be entitled to injunctive relief," *id.*,

ruling that one of the three corporate defendants, having chosen to pursue its conduct and encounter criminal prosecution, was "squarely governed by *Younger [v. Harris* abstention]," precluding it from injunctive or declaratory relief. *Id.* at 929, 95 S.Ct. at 2566-67. The other two corporate defendants, that refrained from their proposed activity and avoided prosecution, "were entitled to have their claims for preliminary injunctive relief considered without regard to *Younger's* restrictions." *Id.* at 931, 95 S.Ct. at 2567.

In this case, the court of appeals affirmed the district court, which followed this Court's analysis, and distinguished between those who refrain from conduct altogether, in the face of threatened prosecution; and Petitioner Redner who defied the Citrus County ordinance, without challenging it, embroiling him in ongoing, state criminal proceedings concerning his adult-entertainment activity without a license, in deference to which abstention was required.

II. THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT, REJECTING PETITIONER REDNER'S CLAIM OF EQUITABLE ESTOPPEL UNDER FLORIDA LAW, PRESENTS NO ISSUE APPROPRIATE FOR REVIEW BY THIS COURT.

Petitioner acknowledges[4] that "[r]elying entirely on Florida law,"[5] the Eleventh Circuit "found that estoppel did not apply."

> [Petitioner Redner] did appeal the holding of the district court that Citrus County was not estopped from enforcing 88-A51 [the zoning ordinance] against him. Redner was unentitled to rely on the inaction of Citrus County in not earlier adopting a zoning ordinance regulating the location of adult entertainment facilities. So, estoppel does not apply. *See City of Miami Beach v. 8701 Collins Ave., Inc.*, 77 So.2d 428, 430 (Fla. 1954); *City of Ft. Pierce v. Davis*, 400 So.2d 1242, 1244 (Fla. App. 4th Dist. 1981); *Pasco County v. Tampa Development Corp.*, 364 So.2d 850, 853 (Fla. App. 2d Dist. 1978).

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[4] Petition at 28.

[5] It is unclear whether Petitioner (for the first time) attempts to argue a claim of equitable estoppel under federal common law – "[t]his Court has historically recognized and applied the doctrine of equitable estoppel"; and "[Petitioner] sought [his] relief, based on the *due process claim* of equitable estoppel," *see id.* at 27, 28 – but he cannot have it both ways. He argued, and supported with state-law authorities, his claim of equitable estoppel under Florida law. The district court rejected the claim, and the court of appeals affirmed, on those same authorities.

Redner v. Citrus County, Fla., 919 F.2d 646, 648 n.4 (11th Cir. 1990).

This Court has emphasized "that, standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8, 103 S.Ct. 2369, 2373 n.8, 72 L.Ed.2d 595 (1983). Notwithstanding a former rule of this Court, now abolished[6], this Court explained its jurisprudential "practice to accept a reasonable construction of state law by the court of appeals 'even if examination of the state-law issue without such guidance might have justified a different conclusion.' " *Id., quoting Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 684 (1976).

In *Bishop v. Wood*, a police officer, whose employment had been terminated without a hearing, brought suit contending that he was a permanent employee, pursuant to a city ordinance, and had been deprived of a property interest without procedural due process. *Id.* at 244-45, 96 S.Ct. at 2077.

This Court determined that the claim of entitlement to a property interest in the police officer's employment "must be decided by reference to state law." *Id.* at 345, 96 S.Ct. at 2077. Whether the public employer had actually granted a guaranty of a hearing prior to dismissal "can

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[6] In *Haring v. Prosise, supra.*, this Court cited its former Rule 17, now abolished, which had expressly authorized the granting of certiorari if a court of appeals had decided an important state or territorial question in a way in conflict with applicable state or territorial law. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4036 at 41 & n.79.

be determined only by an examination of the particular statute or ordinance in question." *Id.*

The Court acknowledged that the ordinance in question could have been fairly read as conferring such a guaranty; but it could "also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures." *Id.* at 346, 96 S.Ct. at 2078. The district court and the court of appeals, without any state-court decisions as precedent, interpreted the ordinance as conferring no such guaranty. This Court accepted that interpretation of state-law by the lower federal courts.

> We do not have any authoritative interpretation of this ordinance by a North Carolina state court. We do, however, have the opinion of the United States District Judge who, of course, sits in North Carolina and practiced law there for many years. Based on his understanding of state law, he concluded that petitioner "held his position at the will and pleasure of the city." [Footnote omitted.] This construction of North Carolina law was upheld by the Court of Appeals for the Fourth Circuit, albeit by an equally divided court. In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.

Id. at 346-47, 96 S.Ct. at 2078. *See Propper v. Clark*, 377 U.S. 472, 486-87, 69 S.Ct. 1333, 1342, 93 L.Ed. 1480 (1949) (Supreme Court hesitates to overrule decision by federal courts on issues of forum state law unless conclusions

unreasonable); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 630, 66 S.Ct. 445, 451, 90 L.Ed. 358 (1946) (on questions of local law, Supreme Court gives deference to courts familiar with local law).

Additionally, in the past, this Court has dismissed, as improvidently granted, a writ of certiorari when later proceedings, such as "[o]ral argument[,] brought into sharper focus than was apparent at the time we granted the writ that the controversy . . . primarily implicates questions of [state] law and presents no federal question of substance." *Wolf v. Weinstein*, 372 U.S. 633, 636, 83 S.Ct. 969, 972, 10 L.Ed.2d 33 (1963).

Petitioner's challenge to the Eleventh Circuit's application of equitable estoppel under Florida law, is inappropriate for review by this Court. The district court's and the court of appeals' application of Florida law to Petitioner's equitable estoppel claim was reasonable, supported by Florida case law. This Court must give deference to the court of appeals' (and district court's) construction and application of the Florida law of equitable estoppel to the instant case.

CONCLUSION

Petitioner presents no issue under federal law that suggests a justification for certiorari review by this Court. In the two lower federal courts he could present no evidence to demonstrate either a bad faith prosecution, or true irreparable harm, to warrant an exception to *Younger v. Harris* abstention. The court of appeals correctly affirmed the district court's abstention.

Petitioner's issue concerning the Florida law of equitable estoppel is inappropriate for review by this Court. In the face of a body of state-court decisions concerning the Florida law of equitable estoppel, the district court and court of appeals properly applied those decisions, concluding that equitable estoppel did not apply. No cause exists for this Court to question the correctness of the court of appeals' affirmance of the district court on this state-law issue.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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